

Some Key Issues In Nigerian Anti-Bribery and Anti-Corruption (“ABC”) Law for Foreign Investors

1. Background

The fight against corruption gained momentum in 2000 when the Corrupt Practices and Other Related Offences Act, 2000 (the “ICPC Act”) was enacted and the Independent Corrupt Practices and Other Related Offences Commission (“ICPC”) (a federal agency) was established. In fact, one of the foremost points in the electoral manifesto of the current administration was its promise to fight corruption vigorously. It has been announced that at least USD300mm has been recovered thus far in the fight against corruption since 2015.

2. The level of bribery and corruption as seen by some enquirers (e.g. Transparency International)

Nigeria has been ranked 136th out of 176 countries, according to the 2016 Corruption Perceptions Index reported by Transparency International. Nigeria scored 28/100. Although this is below the global average score of 43 and indicates endemic corruption in the country’s public sector, it is an improvement over 2015 when Nigeria scored 26/100 but was still ranked 136 out of 167.

3. The ABC law enforcement organizations recognized by law

3.1 There are two principal anti-corruption agencies in Nigeria: the ICPC and the Economic and Financial Crimes Commission (“EFCC”).

3.2 The ICPC was established pursuant to s. 3 of the ICPC Act. The ICPC has the responsibility to receive complaints, investigate and prosecute offenders who have attempted to or committed an offence under the ICPC Act or under any law prohibiting “corruption”. Also, it is the duty of the ICPC to examine the practices, systems and procedures of public bodies and ensure that such systems do not facilitate fraud or corruption. Further, the ICPC advises officers, agencies, and parastatals on ways that fraud may be eliminated or minimized (s. 6, the ICPC Act).

3.3 The EFCC was established pursuant to s. 1 of the Economic and Financial Crimes Commission (Establishment) Act, 2004 (the “EFCC Act”). The EFCC is charged with the responsibility of coordinating the various agencies involved in the fight against money laundering and the enforcement of all laws dealing with economic and financial crimes in Nigeria. “Economic and financial crimes” include fraud, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices (s. 46, the EFCC Act).

3.4 A number of other institutions have powers to fight corruption. Among these are the Central Bank of Nigeria, the Securities and Exchange Commission, the Code of Conduct Bureau and Tribunal for public officers (Code of Conduct Bureau and Tribunal Act (Cap c.15, LFN, 2004) (“CCBT Act”)), the Attorneys-General of the Federation and States (there

are 36 states) and, of course, the Nigerian Police Force (s. 150, 195 and 214 of the 1999 Constitution).

4. The extent to which the law commands, or give incentives to make, disclosure of bribery and corruption

4.1 Any person who discloses information or produces an account or document or article to an authorised officer of ICPC whether by himself or through any agent shall not, on account of such disclosure or production, be liable to any prosecution.

4.2 There are also offences of failing to disclose corruption. Every “public officer” is required to report any gratification given, promised, or offered to him/her in contravention of the ICPC Act to the nearest officer of the ICPC or police officer. (Public officer includes employees, officers and directors of private companies in which governmental bodies have invested.) Also, any person from whom any gratification has been solicited or obtained, or from whom an attempt to obtain has been made in contravention of the ICPC Act, is required to report the same to an officer of the ICPC or a police officer. Failure to report such an incident without reasonable excuse is a crime (s. 23, the ICPC Act). There are other laws that encourage the reporting of corrupt practices.

4.3 Recently, the Federal Government of Nigeria initiated a “whistleblowing” programme with the aim of encouraging the disclosure of hidden proceeds of corrupt practices (see paras. 9.6 and 9.7 below). The economic capital of the country, Lagos State, is also promoting the enactment of a whistle-blower statute, the Disclosure of Impropriety Bill, 2016. (Our partner, Gbolahan Elias, was the chairman of the committee that drew up this Bill.)

4.4 Up until the enactment of the Freedom of Information Act, 2011, (the “FOI Act”) there was no specific law providing for access to public records and information. The FOI Act makes provision for the disclosure of information held by public authorities and institutions. The FOI Act is innovative as it enables transparency in the activities of those in public offices. This makes it possible for citizens to hold the government accountable and also facilitate the investigation of cases by law enforcement agencies. Thus, any person can apply for the public records of government officials, and the same can be granted or denied. Where the application will be denied, the applicant will be notified of the reasons for denial in writing. (s. 4 FOI Act). Where a case of wrongful denial is established, the defaulting officer or institution is liable to a fine of ₦500,000 (s. 7 FOI Act). It is a criminal offence punishable by a minimum of 1 year imprisonment for any public officer to destroy public records or alter same before they are released to any person or entity requesting for same (s. 10. FOI Act).

5. The kinds of principal perpetrator conduct caught by ABC Law

5.1 The ICPC Act ss. 8-26 create offences of (1) accepting gratification, (2) giving or accepting gratification, (3) bribery of public officers, (4) use of office or position for gratification, (5) bribery in relation to auctions, and (6) bribery in regard to contracts.

- 5.2 “Gratification” is the key legal term here. It is defined in the ICPC Act. There, it “includes money, donations, gifts, loan fees, rewards, valuable securities, property or interest in property whether movable or immovable given or promised to any person with intent to influence such a person in the performance of his duties” (s. 2, ICPC Act). Key terms such as “bribery” and “corruption” feature repeatedly in the legislation but are nowhere clearly defined. The EFCC Act on its own part, does not define “Corruption”. To this extent, the law is not as clear as it should be. The legislation does not define “bribery” but it describes “corruption” to include “bribery” (s. 2, the ICPC Act). Presumably “bribery” means the taking or receiving of “gratification”.
- 5.3 We address in this paper only true corruption and bribery involving “gratification” as defined in the Act or comparable conduct. Conduct that involves fraud but with nothing akin to “gratification” are not the subject of this paper whether or not a statute for its own purposes or convenience chooses to label such conduct “bribery” or “corruption”. Thus, we say nothing about, for example, s. 2 of the ICPC Act which also defines “corruption” under the Act to include “fraud”. “Fraud” in its nature is neither inherently “bribery” nor “corruption” whether the ICPC Act says so or not.
- 5.4 Other statutes that criminalize ABC Conduct include the Criminal Code (the “CC”) Act 1990 s. 98(1) (punishing any “public officer who corruptly asks for, receives or obtains property or benefit of any kind for himself or for any other person or agrees or attempts to receive same”) and s. 404 (punishing “any person who being employed in public service compels any person to sell property to him” at a price other than its fair market value).
- 5.5 The Banks and Other Financial Institutions (Amendment) Act, 1991 “prohibits the receipt of any gift, commission, property or thing of value by any staff of any bank for his own personal benefit”- s. 47. The section further provides that such a person will be liable on conviction to a fine of ₦50,000 or imprisonment to a term of 5 years, or both, and in addition forfeit such gift or commission to the Federal Government. The Code of Conduct Bureau and Tribunal (“CCBT”) Act criminalizes the offering of gifts or benefits as inducement or bribe for granting or discharging of favours of the public officer’s duty (s. 10 of the CCBT Act). The Money Laundering (Prohibition) (the “MLP”) Act 2011 has extensive provisions on the laundering of proceeds “corruptly” obtained and penalizes the conversion of or transfer of corrupt proceeds out of Nigeria. The EFCC is responsible for enforcing the provisions of the MLP Act.
6. **The possible defences that are precluded by ABC Law**
- 6.1 The law here is still largely untried in the courts so that much is still unclear, but, generally speaking, the law does not readily allow defences. It is no defence that the acts in question were committed outside Nigeria (s. 13, ICPC Act), or by a non-Nigerian, or that none of the parties involved was a public sector actor (s. 8, ICPC Act), or that the acts involved occurred entirely in a private sector context (s. 8, ICPC Act). Indeed, there are specific offences of bribery in relation to auctions and contracts (ss. 21 and 22, ICPC Act).
- 6.2 To repeat, “gratification” under the ICPC Act includes benefits “given or promised to any person with intent to influence such a person in the performance or non-performance of

his duties”. Under s. 60 of the ICPC Act evidence of custom is inadmissible as a defence. However, under s. 10(3) of the CCBT Act, a public officer may accept personal gifts or benefits from relatives or personal friends to such extent and on such occasions as are recognized by custom. Beyond this, there is no defence based on the customary or closeness-of-prior relationship nature of the giving.

6.3 Gifts (a) made after the outcome is known and/or (b) unable to influence the outcome are nevertheless criminal. These features too do not constitute defences. The offence is complete once the gift is offered “on account of anything already done or to be done or omitted or to be omitted” (s. 8-10, ICPC Act). Under Nigerian law, ignorance of the law is generally never a defence. *God Bless Ezenwata Nigeria Ltd v. Odioku* (2015) LPELR-24438(CA); and *Idris v. ANPP* (2008) 8 NWLR (Pt. 1088) 1. Also, as was decided in *Azie v. The State* (1973) 3 S.C 104, *mens rea* can be a defence to criminal conduct. The court held that for a person to be held criminally liable for bribery as provided in s. 98 CC Act, the giver and taker of the bribe must have done so with a corrupt intention with a view to influencing the performance of duties.

7. **The extent to which accessories (as distinct from principal perpetrators) caught by ABC Law**

7.1 Both juristic entity and human individual perpetrators are caught by the law. Several provisions also catch those who support perpetrators (as distinct from the perpetrators themselves). The law catches accessories who only counselled, instigated, assisted, aided or abetted the acts in question and were not the actual perpetrators (ss. 8(3) and 26, ICPC Act). (S. 11 of the ICPC Act provides that in any proceedings for an offence under the ICPC Act, it is not necessary to prove that any public officer counselled the commission of the offence.) It is also not a defence that the gratification was received through an agent (s. 17, ICPC Act), or was for the benefit of a third party (ss. 8 - 10, ICPC Act).

7.2 The CC Act provides in s.7 that “every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence”; “every person who aids another person in committing the offence”; and “any person who counsels or procures any other person to commit the offence” is guilty of the offence and may be charged with actually committing it. It is important to note that the CC Act also punishes an attempt to commit an offence (s.4 CC Act).

7.3 Those who impede the course of justice too are guilty of crimes. Failure to report bribery (s. 23(3), ICPC Act), withholding information (s. 40, ICPC Act), receiving the proceeds of bribery or corruption (ss. 8-10, ICPC Act), making false statements to the ICPC (s.25, ICPC Act), tampering with evidence and the deliberate frustration of investigation by the ICPC (s. 15, ICPC Act) are all crimes.

8. **The sanctions imposed by ABC law**

8.1 The law imposes a variety of sanctions. There is imprisonment for terms ranging from two (2) to seven (7) years, fines between ₦5,000 and ₦1,000,000, temporary detention orders, civil remedies, disqualifications and forfeiture. The courts may order the forfeiture of any property that is the subject-matter of an offence. Ss. 47 and 48 of ICPC Act.

- 8.2 Property that is subject-matter of an offence may also be seized temporarily. Ss. 37 and 45 of ICPC Act. Books, documents or other articles evidencing commission of crime too may be seized. S. 36(1)(a) of the ICPC Act. Further, s. 46 of the ICPC Act empowers the Chairman of the ICPC to apply to the courts for an order prohibiting any person by whom property is held or with whom it is deposited from dealing with the property (held or deposited outside Nigeria) that is the subject-matter of an offence under ICPC Act.
- 8.3 A basic punishment is the payment of fines (for instance, of not less than five times the sum of the value of the gratification which is the subject-matter of the offence or ₦10,000.00, whichever is higher). S. 20 of the ICPC Act. A financial penalty may also be imposed in a sum which is equivalent to the amount or value of the gratification where the offence is proved against the accused, or the property has been disposed of, or cannot be traced. S. 46(2) of ICPC Act.
- 8.4 The sanctions also include disqualification for up to ten (10) years from being a director in corporate entities and from public office. Ss. 254, 257 and 258 of the Companies and Allied Matters Act, 1990 and 66(1)(d), 107(1)(d) 137(1)(e) and 182(1)(e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Civil law remedies – damages, rescission, fiduciary accounting for secret profits, tracing and injunctions -- are also obtainable where the victim or state files and succeeds in civil claims against the offender.
- 8.5 The CCBT Act also provides for sanctions for any public officer found contravening the provisions of the Act. The sanctions range from vacation of office of the officer, disqualification for up to ten (10) years from holding any public office, seizure and forfeiture to the State of any property acquired in abuse or corruption of office (s. 23(2)). The sanctions aforementioned are irrespective to penalties that may be imposed by any other law where the said conduct is held to be a criminal offence. S. 23(3) of the CCBT Act.

9. **Some topical issues in ABC Law**

9.1 Approaches in Fighting Corruption

There have been some perceptions that what is being dealt with is the tail of the monster of corruption rather than its head and that a panoply of approaches should be adopted in the fight against corruption. Several ways have been suggested. There needs to be better coordination among the bodies responsible for fighting corruption. Tools used by successive governments include the creating of specialist agencies, such as the ICPC and EFCC, improved funding, security of tenure for officers, better training of officers, a more efficient court system and the firm discipline of errant judges. Further, the Administration of Criminal Justice Act, 2015 (ACJA) s. 396(3) encourages day-to-day trial of a defendant upon arraignment.

9.2 Lack of Resources

Many prosecutions are lost owing to the (i) lack of thorough investigation of cases and procuring sufficient evidence to substantiate charge(s) before proceeding to Court; (ii) limited personnel capacity of anti-bribery agencies; and (iii) bad case management by the prosecutors. The investigating and prosecuting authorities are badly under-resourced. Our ratios of policemen, lawyers and judges respectively to the entire population are significantly lower than the ratios that obtain in most western world countries.

9.3 Selectiveness

There have been allegations that the current war against corruption is selective since it is being fought against those perceived to be opposed to the incumbent government or those in the opposition parties.

9.4 Plea-bargaining

Following years of doubt (2005 - 2013) and denial (2013 - 2015), plea bargaining is now recognized in Nigerian federal and state law (the Administration of Criminal Justice Law, 2011 (s. 76, ACJL), ACJA (s. 270, ACJA)). Many members of the public also have misgivings about it as it appears to offer a way for guilty powerful people to escape full punishment for their crimes.

9.5 Discontinuance of Criminal Proceedings (*Nolle Prosequi*)

The 1999 Constitution empowers the Attorneys-General of the Federation and States to discontinue any criminal proceedings, at any time before judgment (s. 174(1)(c) and 211 (c), 1999 Constitution, s. 107, Administration of Criminal Justice Act, 2015, *Amaefule v State* (1988) 2 NWLR (Pt. 75) 156, *FRN v Osahon* (2206) 5 NWLR (Pt. 973) 361). A *Nolle Prosequi* operates as a mere discharge and not as an acquittal. There are widespread allegations that this power has often be used to frustrate the prosecution of some politically-powerful individuals who have engaged in conduct that is criminal under ABC Law.

9.6 Whistleblowing: Protection

A whistle-blowing policy has been introduced by the Federal Ministry of Finance. By this, people are encouraged to provide useful information. A portal for the programme (whistle@finance.gov.ng) was also created. Whistleblowers are protected to a large extent within the law. For instance: (i) the identity of a whistleblower who chooses not to disclose his/her identity will not be recorded. If the whistleblower chooses to disclose his/her identity, the identity will only be disclosed in circumstances required by law; (ii) where it is established that a whistleblower has suffered any adverse treatment in retaliation as a result of a genuine disclosure, the whistleblower will be restituted for any loss suffered and disciplinary action may be taken against the perpetrator under public service rules/other extant rules. The Lagos State Government is also developing a draft statute on whistle-blowing (Disclosure of Impropriety Bill, 2016).

9.7 Whistleblowing: Reward

Whistle-blowers are rewarded with amounts between 2.5% and 5% of the recovered funds. On June 6, 2017, the Federal Ministry of Finance announced that so far it had paid ₦375.8 million (about USD1mm) to 20 providers of information under its whistleblowing Policy. The information provided has so far led to the recovery of ₦11,635,000,000.00 (See <http://leadership.ng/2017/06/08/anti-corruption-fg-pays-n375-8m-20-whistleblowers/> or <http://saharareporters.com/2017/06/07/nigerian-govt-pays-20-whistleblowers-n3758million>).

9.8 Whistleblowing: Codes of Conduct

The general Code of Corporate Governance for Public Companies in Nigeria (promoted by the Nigerian securities industry regulator) requires public companies to have a whistleblowing policy which should be made known to their staff and stakeholders. This is also a requirement under the more specialized Code of Corporate Governance for the telecommunications industry, 2016 and the Code of Corporate Governance for Banks and Discount Houses in Nigeria and Guidelines for Whistle-Blowing in the Nigerian Banking Industry, 2014.

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